



Legislative Bulletin.....August 3, 2007

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H.R. 3356 —Improving Foreign Intelligence Surveillance to Defend the Nation and the Constitution Act of 2007

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 1

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 3356 — Improving Foreign Intelligence Surveillance to Defend the Nation and the Constitution Act of 2007 (*Conyers, D-MI*)

Order of Business: The bill is scheduled for consideration on Friday, August 3, 2007, under a motion to suspend the rules and pass the bill.

Summary: H.R. 3356 would amend the Foreign Intelligence Surveillance Act (FISA) of 1978 to amend procedures to request and initiate an electronic surveillance order. The major provisions of the bill are summarized below.

Additional Procedures for Authorizing Certain Electronic Surveillance.

- Provides that a court order is not required to obtain any communication between people not located within the U.S. for the purpose of collecting foreign intelligence information, regardless of whether the communication passes through the U.S. or the surveillance device is located within the U.S.;

- Allows the Attorney General (AG), upon the authorization of the President, to apply to a judge of the court established under section 103(a) for an ex parte order, or an extension of an order, authorization electronic surveillance for periods of up to one year, for the purpose of obtaining foreign intelligence information.
- States that the application for the order is not required to identify:
 - a) the persons that the electronic surveillance is directed toward (other than a foreign power); or
 - b) the specific facilities, places, premises, or property where the electronic surveillance will be directed;
 Note: Ex parte means a notice on behalf of one party *without* notice to any other party

FISA Order Application Requirements.

- Requires that an application for an order must include:
 - a) a statement that the surveillance is directed at people reasonably believed to be outside the U.S.;
 - b) the identity of the federal officer seeking to conduct the surveillance;
 - c) a description of the methods to be used by the AG to determine that the target of surveillance is outside the U.S., and the procedures to audit the implementation of the aforementioned methods;
 - d) a description of the nature of the information sought, including the identity of any foreign power the surveillance is directed toward;
 - e) a statement of the means by which the surveillance will be effected.
- Requires that a judge considering an application for a FISA order, or extension of an order, must approve the application if the AG certifies in writing under oath, and the judge determines, that:
 - a) the acquisition does not constitute electronic surveillance within the meaning of paragraph (1) or (3) of section 101(f);
 - b) the AG methods are “reasonably designed” to determine whether the persons are outside the U.S.;
 - c) a “significant purpose” of the electronic surveillance is to obtain foreign intelligence information;
 - d) the proposed minimization procedures meet the definition under current law.

FISA Order Application Approval Requirements.

- Directs a judge approving an application to issue an order that:
 - a) authorizes surveillance as requested, or as modified by the judge;
 - b) requires a communications service provider or other person who has lawful authority to access the information or facilities to furnish the applicant information (upon request) in a manner that will protect the secrecy of the surveillance and produced minimum interference with the services of that provider;
 - c) requires the service provider (upon request of the applicant) to maintain records concerning the acquisition or the aid furnished (under security procedures approved by the AG or the Director of National Intelligence);

- d) directs the federal government to compensate a person (at the prevailing rate) for providing information or assistance to such an order; and
 - e) directs the applicant to follow the minimization procedures as proposed or modified by the court.
- Allows a judge, at or before the end of the time period approved for surveillance, to assess compliance with the minimization procedures by reviewing the circumstances under which information concerning U.S. persons was acquired or disseminated.

Guidelines for Surveillance of U.S. Persons

- Requires the AG, within 15 days of enactment, to establish guidelines that are “reasonably designed” to ensure that a FISA application is filed when the AG seeks to initiate or continue electronic surveillance of a U.S. person.

Submission of Orders, Guidelines, and Audits.

- Requires the AG, upon entry of an order under subsection c2, to submit the order to the appropriate congressional committees.
- Requires the AG, upon establishing the guidelines noted above, to submit those guidelines to the appropriate congressional committees.
- Requires the DoJ Inspector General, within 60 days of enactment and every 60 days thereafter, to complete an audit on the compliance with the above mentioned guidelines, and submit results of the audit to the appropriate congressional committees.

Immediate Emergency Authorization

- Allows the AG, within the first 15 days following enactment of this section and upon the authorization of the President, to authorize electronic surveillance without a court order under this title:
 - a) if the AG determines that an emergency situation exists, where electronic surveillance is necessary, before an order authorizing such surveillance can be obtained with “due diligence”;
 - b) the electronic surveillance will be directed at persons “reasonably believed” to be outside the U.S.
- Allows a court to extend the emergency authorization of the AG for 15 days if it has not been approved or disapproved by the court under the normal procedure, and allows it to be extended once more for 15 days if the court has not acted yet. Stipulates that the maximum length of time for an emergency authorization is 45 days without a court order.

Prohibition on Liability for Providing Assistance

- Extends the current protect from liability (section 105i) to the above mentioned procedures.

Sunset Provision

- Repeals the above mentioned provisions of this Act (section 105A and 105B of FISA) after 120 days of enactment of this Act, but allows any order arising from this Act that is still in effect to continue in effect until the expiration date of the order.

Additional Background: FISA was created in 1978 to establish a process for obtaining a court order to conduct foreign intelligence surveillance within the United States. Due to dramatic changes in telecommunications technology since then, FISA now frequently requires government officials to obtain a court order to gather information on suspected terrorists and various other foreign intelligence targets located overseas. Federal law has not historically restricted law enforcement officials or intelligence agents from monitoring overseas communications, and this bill is intended to address these concerns.

Possible Conservative Concerns: Some conservatives may be concerned that, while the bill recognizes that a court order under FISA is not required to collect overseas electronic surveillance, the bill fails to expressly provide the AG or Director of National Intelligence the authority to collect such information. Some conservatives may also be concerned that the provisions of the bill attempting to address these discrepancies (regarding when a court order is required and the procedures for obtaining a court order) expire 120 in days, leaving our intelligence community in the current less-than-desirable situation. Some conservatives may also be concerned with the additional reporting and application requirements imposed upon the intelligence community in order to obtain a FISA court order.

Further, some conservatives may be concerned that this bill is being considered under suspension of the rules, thereby eliminating the possibility for amendment and providing no extended debate on an issue of national security.

The bill is opposed by Intelligence Committee Affairs Ranking Member Pete Hoekstra and Judiciary Committee Ranking Member Lamar Smith. The bill is also opposed by the Director of National Intelligence, Michael McConnell, who made the following statement today regarding H.R. 3356:

I have reviewed the proposal that the House of Representatives is expected to vote on this afternoon to modify the Foreign Intelligence Surveillance Act. ***The House proposal is unacceptable, and I strongly oppose it. (emphasis added)***

The House proposal would not allow me to carry out my responsibility to provide warning and to protect the Nation, especially in our heightened threat environment.

I urge Members of Congress to support the legislation I provided last evening to modify FISA and to equip our Intelligence Community with the tools we need to protect our Nation.

Committee Action: H.R. 3356 was introduced on Friday, August 3.

Administration Policy: No Statement of Administration Policy is available. The Director of National Intelligence is opposed to H.R. 3356 (see quote above).

Cost to Taxpayers: A CBO score of H.R. 3356 is unavailable.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: A committee report citing constitutional authority is unavailable. House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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